

THROUGH THE MIRRORED GLASS: REMOTE NEGOTIATION IN A POST-PANDEMIC WORLD

Justin D. Lischak Earley *

*As presented to the American College of Mortgage Attorneys
at its September 2021 annual convention in St. Louis, Missouri*

Abstract

Nearly five decades of research has been directed towards negotiation theory. Since the 1990s, a significant portion of that research has explored the dynamics of remote negotiation facilitated by technology. Given that the COVID-19 Pandemic has caused a rapid shift to remote work that is likely to outlast the immediate health crisis, and given that many lawyers learned “the classic rules” of negotiation in a world with very different communication methods than exist today, this paper reviews key literature on negotiation theory to suggest two practical rules of thumb that could benefit practitioners dealing with a rapidly-changed and still-changing world. The lessons of this review are that practitioners need to be keenly aware of how the negotiation medium can affect negotiation dynamics. In particular, communication channels can create (or eliminate) information asymmetries, and thus advantage (or disadvantage) parties to a negotiation. The practical upshots of these principles are that the message should determine the medium, and that no participant in a negotiation should be allowed to create an information asymmetry by using a communication medium that is less rich or less synchronous than that being used by other, equivalent-level participants.

* Justin Lischak Earley is Vice President and Underwriting Innovation Director for the Corporate Underwriting Department of First American Title Insurance Company. The views that Justin expresses in this article are his own personal scholarly opinions, and are not necessarily the views of his employer. This is a purely academic article, and the views that Justin expresses here are in no, way, shape, or form investment advice as regards Justin's employer, nor are they legal advice as regards anyone or any situation. Justin is a fellow of the American College of Mortgage Attorneys and a fellow of the American College of Real Estate Lawyers. He received his law degree from Duke University, and received his master's degree in Human-Computer Interaction & Design from the University of California, Irvine. Justin can be found online at <https://jdlesq.com>

What do Darth Vader, the Wizard of Oz, Corey Hart, mirrored-glass police interrogation rooms, and that single off-camera person on your Zoom call have in common? They are all exploiting information asymmetries to their advantage. This paper explores the social science research that provides a conceptual basis for understanding information asymmetries that can be created by the rapid, Pandemic-induced shift to real-time audio-video methods of negotiation in real estate practice. Armed with this knowledge, the reader will be better prepared to choose the right communication medium for the message, and will understand how to eliminate—or exploit—information asymmetries in remote real estate transaction negotiations.

I. MEDIA RICHNESS THEORY

All negotiation requires communication,¹ and unless counterparties are physically within earshot and eyeshot of one another, that in turn requires the use of some non-biological communication channel to facilitate the communication. Today, that communication channel could range from decidedly old-school (snail mail) all the way up to the latest technology darlings (Zoom, etc.). A key framework for understanding the differences between these communication channels is called “media richness theory.”

Media richness theory arose in the 1980s as a way of understanding the dynamics of communication within organizations.² Since that time it has been expanded as a theory that can help explain communication dynamics in other contexts.³ Media richness theory sorts communication channels based on their ability “to convey messages to other[s] in clear and timely manners.”⁴ Although the world has changed greatly since the 1980s, and the theory has evolved and been amended over time, the basic premises of the theory remain sound.⁵

¹ ROGER FISHER & WILLIAM URY, *GETTING TO YES* 32 (2d ed. 1991).

² Noor Akma Mohd Salleh & Segigheh Moghavvemi, *Media Richness Theory for Social Media Research: Opportunities and Challenges*, in SOCIAL MEDIA: DYNAMISM, ISSUES, AND CHALLENGES 123-25 (Ainin M. Sulaiman & Muzamil Naqshbandi eds., 2014).

³ *Id.*

⁴ *Id.*

⁵ Kumi Ishii, Mary Madison Lyons & Sabrina A. Carr, *Revisiting Media Richness Theory for Today and Future*, 2019 HUMAN BEHAVIOR & EMERGING TECH. 124, 129 (conducting a literature review of media richness theory and concluding, “media richness theory remains the landmark foundation of studies on continuously evolving communication technology”).

There are two fundamental parameters of a communication channel: the richness of the communication channel, and its level of synchronicity (real-timeliness).⁶ The breadth of information transmitted by a channel is referred to as its “richness.”⁷ While this can be difficult to verbally explain, it is easy to conceptualize: a snail mail letter is a less rich form of communication than is an everyone-on-camera Zoom call. The snail mail letter only transmits written words. The Zoom call transmits spoken words, facial expressions, awkward pauses, people who fail to mute themselves while using the bathroom, etc. The Zoom call is thus a more rich form of communication than is the snail-mail letter.

Synchronicity is fairly easy to understand—it is how “real-time” the communication may be.⁸ Communications of equal richness can have varying levels of synchronicity. For example, an email and a snail-mail letter may have the same level of richness, but one arrives (nearly) instantly, and the other can take several business days. Similarly, a very rich video message can be transmitted by snail-mailing it on a USB thumb drive, or it can be delivered in real-time (Zoom).

In general, media richness theory suggests that communication channels that are less rich and less synchronous will struggle to convey nuanced messages to others.⁹ This insight may seem blindingly obvious, but like most good pieces of social science, its obviousness never seems to register with us humans when it really needs to. All of us have experienced the embarrassment of a misunderstood email and wondered, “Why didn’t I just pick up the phone?”

⁶ Strictly speaking, this statement is really more accurately described a nutshell version of “media synchronicity theory,” an update / extension of media richness theory. See generally, e.g., Alan R. Dennis & Joseph S. Valacich, *Rethinking Media Richness: Towards a Theory of Media Synchronicity*, PROCEEDINGS OF THE 32ND HAWAII INT'L CONF. ON SYSTEM SCIENCES (1999). For our lawyerly purposes, we only need the basic points, and we do not need to delve into these fine academic distinctions in social science theory. As even these authors note, they “extend the original..dimensions of media richness theory.” *Id.* at 8.

⁷ Salleh & Moghavvemi, *supra* n.2, at 145 (“The extent of richness is defined based on the number of the cues that a medium passes on and how easy it is [for the recipient] to give feedback. The more cues can be passed on and the easier it is to give feedback, the higher the information richness.”).

⁸ Dennis & Valacich, *supra* n.6, at 5 (“Synchronous activity is that which moves at the same rate and exactly together. Media synchronicity is the extent to which individuals work together on the same activity at the same time; i.e., have a shared focus.”).

⁹ See Salleh & Moghavvemi, *supra* n.2, at 145-46.

Specifically, “[t]here are two components of a communication channel’s ability to carry information: (1) data-carrying capacity, and (2) symbol-carrying capacity.”¹⁰ Data-carrying capacity is the ability to transmit pure information. This is “just the facts.” Some facts are best conveyed by less rich, less synchronous communication channels.¹¹ It probably is not a good idea to read out every row and column of a spreadsheet on a Zoom call. Instead, the spreadsheet is probably best sent by email.

By contrast, symbol-carrying capacity is the ability to transmit information about the persons who are communicating.¹² Consider two parties (Alice and Bob). Alice needs to discuss this month’s billable hours numbers with Bob. Alice is upset because Bob’s billables are significantly down for this time period, and while she wants to convey to Bob that this is an issue, she doesn’t want to hurt Bob’s feelings or demoralize him. This is a nuanced message that requires a high symbol-carrying capacity. The number of Bob’s billable hours is simply data to be carried by the communication channel, but Alice’s complex coaching message is second-order symbolic information about Alice, who is doing the communicating. This is a case where Alice would be well advised to use a richer, more synchronous communication channel than mere email.

In other words, the basic lesson of media richness theory is that *a message sender should choose a communication channel that contains a level of richness and synchronicity appropriate to the message*. Often this turns on the level of “equivocality” in the message. Messages that are simpler, more factual, more routine, and less subject to interpretation can be sent by less rich, less synchronous communication channels. Many times, purely textual and asynchronous forms of communication (e.g., email, text message) work best for these unequivocal messages.¹³

By contrast, messages that are complex, nuanced, less routine, and more subject to interpretation should be sent by more rich, more synchronous communication channels.¹⁴ Historically, for lawyers this meant phone calls or face-to-face meetings. Although real-time audio-video (RTAV) communications platforms have existed

¹⁰ *Id.* at 125.

¹¹ Ishii *et al.*, *supra* n.5, at 129 (“The improved theory suggests that each medium has different capabilities....”).

¹² Salleh & Moghavvemi, *supra* n.2, at 145.

¹³ Ishii *et al.*, *supra* n.5, at 124.

¹⁴ *Id.*

since at least the mid-1990s,¹⁵ these were rarely utilized by most large-firm or large-company real estate attorneys prior to the Pandemic.¹⁶

The practical upshot was that, for real estate practitioners, there was essentially no communication method that lay “in-between” the phone and face-to-face options.¹⁷ However, since the onset of the Pandemic, the explosive growth of RTAV communication methods has presented a host of new opportunities (and challenges) for lawyers who (by choice or by client necessity) now utilize these rich, synchronous communication methods almost daily. Given the unprecedented pace at which RATV communications have been adopted into law practice, lawyers could benefit from an understanding of what research has shown about the effect that communication channels can have on negotiations.

II. NEGOTIATION STRATEGIES: OLD SCHOOL AND NEW SCHOOL

Social scientists have studied negotiation for over 50 years, and this research has demonstrated that humans generally fall into one of two basic negotiating strategies.¹⁸ On the one hand are those who adopt “distributive” or “claiming” strategies. These “consist[] primarily of attempts to influence the counterpart to make concessions by using threats and emotional appeals, and [of] single-issue offers.”¹⁹ A classic archetype of this strategy is Harry Zale, the “skull-and-crossbones suspenders” loan workout specialist in Tom Wolfe’s novel *A Man in Full*.²⁰

On the other hand are those who adopt “integrative” or “creating” strategies. These “consist[] primarily of sharing information about interests and priorities and then fashioning tradeoffs (logrolling) to generate high joint gains.”²¹ These are the prototypical “win-win” types who seek consensus and don’t care who is “winning” the negotiation as long as their side gets what it needs out of the interaction.

¹⁵ See, e.g., Cisco Webex, https://en.wikipedia.org/wiki/Cisco_Webex (last visited 1 July 2021).

¹⁶ There are many reasons for this, which are beyond the scope of this paper.

¹⁷ If I was a law professor, I would say that this represented a lacuna in the practice.

¹⁸ Jeanne Brett & Leigh Thompson, *Negotiation*, 136 ORG. BEHAV. & HUMAN DECISION PROC. 68, 69 (2016).

¹⁹ *Id.*

²⁰ TOM WOLFE, *A MAN IN FULL* 35 (1998) (“He was a workout artiste, and the workout artistes were the Marines, the commandos, the G.I. Joes of commercial banking. Or maybe the term should be D.I., for drill instructor....”).

²¹ Brett & Thompson, *supra* n.18, at 69.

“Negotiators primarily using distributive strategy claim more value than those who engage in less distributive strategy, but typically fail to identify tradeoffs that would have created value. Negotiators primarily using integrative strategy create more value than negotiators primarily using distributive strategy.”²² It is for this reason that the method of negotiating offered by the classic book *Getting to Yes* has been heavily taught in law schools. It is largely grounded in integrative strategy, viewing negotiation as a rational activity of seeking consensus and unearthing shared value that will (on the whole, all other things being equal) lead to superior outcomes for all sides of a negotiation.²³ Several generations of lawyers have thus been taught that the “best” approach to negotiation is usually an integrative strategy.

A significant factor in the success of any integrative negotiation approach is trust. In particular:

Trust is the willingness to make oneself vulnerable to another person. Negotiation research shows that trust in the counterpart facilitates information sharing, insight (understanding the other’s priorities), and joint gains. Trust affects negotiation strategy, interaction, and outcomes because the integrative strategy of asking and answering questions gives the counterpart an opportunity to take advantage. Asking invites vulnerability by revealing gaps in a negotiator’s knowledge. Answering invites vulnerability by revealing negotiators’ priorities and interests. Trust mitigates these risks because it is grounded in the belief that shared information will be used to identify mutually-beneficial opportunities. Low trust causes negotiators to fall back on the distributive strategies of making offers and engaging in influence attempts.²⁴

Trust is a function of social connection to others.²⁵ It is therefore unsurprising to find that, in general, the further one feels (both physically and visually) from a negotiation counterpart with whom one has no prior relationship, the less likely

²² *Id.*

²³ See Fisher & Ury, *supra* n.1, at 15 (describing the four pillars of the *Getting to Yes* strategy as separate the people from the problem, focus on interests rather than positions, find options for mutual gain, and insist on objective criteria for success).

²⁴ Brett & Thompson, *supra* n.18, at 73.

²⁵ Edward L. Glaeser, et al., *Measuring Trust*, 115 QUARTERLY J. OF ECON. 811, 814 (2000) (“[T]he degree of social connection...the number of friends they have in common and the duration of their acquaintanceship—generally predicts the levels of trust and trustworthiness in the two-person trust game.”).

one is to build trust with that counterpart, and the more likely one is utilize distributive strategies against that counterpart. Stated more scientifically, “Spatial distance between parties work[s] to obscure the sense of social existence of the other in interactions.”²⁶ Furthermore, “[f]ocusing on the lack of visual information, researchers have found that it extensively influences users’ psychological and behavioral processes....[V]isually-anonymous negotiators underestimate the possibility of being retaliated against by the other party even if they selfishly behave to obtain more profit.”²⁷

In short, people are less likely to trust others that they don’t know, can’t see, and who aren’t physically nearby. And people are more willing to use aggressive or manipulative tactics against people they don’t know, can’t see, and who aren’t physically nearby. Thus, we get the raging dumpster fire that is today’s internet.

This “classic” research on negotiation suggests that, for those taking the “high ground” approach of integrative negotiation strategy, the choice of communication medium should generally be as rich and synchronous as possible under the circumstances. Richer, more synchronous forms of communication facilitate the trust-building and information-sharing that underlie successful integrative negotiation strategies. This would seem to bode well for the utility of RTAV communication methods made *en vogue* by the Pandemic.

All that being said, there is an emerging counterpoint to these “classic” rules of negotiation that rejects the basis premises of *Getting to Yes*. This “new school” of negotiation postulates that negotiation is not a rational act of seeking consensus, but rather is an emotional dance driven by unconscious, evolutionary impulses that are ripe for manipulation. Conscious logic and reason are secondary actors in negotiation outcomes, and their applications are framed and bounded by the unconscious mind.

The groundbreaking work of psychologist-economists Amos Tversky and Daniel Kahneman underlies much of this approach. Kahneman describes their core thesis as being two “systems” of thinking embedded into all human minds:

²⁶ Taketoshi Hatta & Ohbuchi Ken-ichi, *Effects of Visual Cue & Spacial Distance on Exitability in Electronic Negotiation*, 24 COMP. IN HUMAN BEHAVIOR 1542, 1543 (2008).

²⁷ *Id.* at 1544.

In the story I will tell, Systems 1 and 2 are both active whenever we are awake. System 1 [the unconscious] runs automatically and System 2 [logical reasoning] is normally in a comfortable low-effort mode, in which only a fraction of its capacity is engaged. System 1 continuously generates suggestions for System 2: impressions, intuitions, intentions, and feelings. If endorsed by System 2, impressions and intuitions turn into beliefs, and impulses turn into voluntary actions. When all goes smoothly, which is most of the time, System 2 adopts the suggestions of System 1 with little or no modification.²⁸

Under this paradigm, the negotiator's job is not to seek reasoned consensus, but rather to manipulate the unconscious "System 1" of one's counterparty. A prime example of this approach and its associated tactics is *Never Split the Difference*, written by former FBI hostage negotiator Chris Voss. He describes the core of his approach thusly:

Negotiation does not mean browbeating or grinding someone down. It simply means playing the emotional game that human society is set up for....Effective negotiation is applied people smarts, a psychological edge in every domain of life: how to size someone up, how to influence their sizing up of you, and how to use that knowledge to get what you want.²⁹

What both the "old / integrative" and "new / System 1" rules of negotiation have in common is a focus on information gathering and exchange: "[A]ll negotiation, done well, should be an information-gathering process that vests your counterpart in an outcome that serves you," writes Voss in *Never Split the Difference*.³⁰ And as Fisher & Ury state in *Getting to Yes*, "Without communication there is no negotiation. Negotiation is a process of communicating back and forth for the purpose of reaching a joint decision."³¹ Again, all of this would seem to suggest that good things can come from RTAV communication methods, which transmit rich information in

²⁸ DANIEL KAHNEMAN, THINKING, FAST AND SLOW 24 (2013).

²⁹ CHRIS VOSS, NEVER SPLIT THE DIFFERENCE: NEGOTIATING AS IF YOUR LIFE DEPENDED ON IT 18 (2016) See also ROBERT B. CIALDINI, INFLUENCE: THE PSYCHOLOGY OF PERSUASION, at xiv (rev. ed. 2007) ("[E]ach principle is examined as to its ability to produce a distinct kind of automatic, mindless compliance from people, that is, a willingness to say yes without thinking first.").

³⁰ Voss, *supra* n.29, at 147.

³¹ Fisher & Ury, *supra* n.1, at 32.

a synchronous fashion that can reasonably approximate face-to-face interactions, often considered (rightly or wrongly) to be the top of the heap when it comes to communication effectiveness.³² But it also suggests pitfalls for the unwary.

III. TWO REMOTE NEGOTIATION RULES OF THUMB

This review of negotiation literature suggests two rules of thumb for practitioners: the choice of communication medium should be one that both 1) is matched in richness and synchronicity to the complexity of the problem at hand; and 2) ensures that information exchanges are symmetric. Each of these heuristics may (again) seem self-evident. But things that are self-evident are somehow often forgotten.

A. MATCH THE MEDIUM TO THE MESSAGE

First, it's important to *think* about the choice of communication channel, and make the decision deliberately in light of the complexity of the message to be conveyed. Lawyers have a habit of using communication methods that are one size too small: We have all received emails that should have been voicemails; we have all received voicemails that should have been conference calls; and we have all been on conference calls that should have been face-to-face meetings. Soon, we will all be lamenting that we were on Zoom calls that should have been face-to-face meetings. On the other hand, lawyers also have an understandable tendency to stick to the currently-familiar. Notwithstanding the fact that it has ingrained itself into our daily lives, Zoom and its competitors are not the one-size-fits-all answer to all of our communication needs, either.

The research thus shows that we shouldn't reach for a rich, synchronous method of communication when a sparse one will do. First, heavy factual data can be lost in the rich, real-time firehose of information flying at your counterparty. Again, a video call is not the right method to convey every row and column of a dense spreadsheet. And second, using a rich, synchronous communication method without deliberate thought could cause you to reveal unnecessary, second-order symbolic data that can be leveraged against you by your counterpart. Unconsciously showing your concerned facial expressions when dealing with bad facts for your side is unlikely of benefit.

³² See, e.g., Dennis & Valacich, *supra* n.6, at 3 (criticizing this commonly-held belief and explaining their view as, "concluding that face-to-face communication is the 'richest' media is inappropriate.")

By contrast, it's equally problematic to use a sparse method of communication when a rich one is needed. First, you lose the opportunity to transmit appropriate, second-order symbolic data that helps your counterpart understand a nuanced message. Showing your empathetic facial expression while expressing your sincere desire to achieve a mutually-beneficial resolution probably *is* of benefit, and this nuanced message is better expressed through RTAV than by cold email. Similarly, reaching for a too-sparse, too-asynchronous communication method means losing the opportunity to gather second-order symbolic data about your counterpart: How do *they* look when they give their party line? What signals are *they* sending, whether consciously or unconsciously?

Giving conscious thought to the message to be conveyed, and choosing the right medium to convey that message, is the first negotiation rule of thumb to remember in this new post-Pandemic, "hybrid work" world.

B. BEWARE OF INFORMATION ASYMMETRIES

Creating and exploiting information asymmetries is a negotiation tactic as old as mankind. An information asymmetry arises when some people have information, and others do not. This is why Darth Vader wears a mask, why the Wizard of Oz hides behind a curtain, why police stand behind mirrored glass when interrogating suspects, and why celebrities wear sunglasses at night. All of these behaviors are methods of creating an information asymmetry that advantages one party over the other. They receive information about you, but don't give similar information in return. When some parties have access to richer, more synchronous forms of communication data than do others, this creates an information asymmetry that can be exploited.

This suggests that we should be exceptionally wary of "mixed" negotiations, in which some people use richer or more synchronous forms of communication than do others. And curiously, RTAV communication methods are *particularly* prone to information asymmetries, because they are capable of transmitting rich data streams that can be selectively filtered. Consider a classic, pre-Pandemic phone conference call: It transmits audio only, in real time. You can't "back down" the richness level of this communication channel without eventually causing the communication process to self-destruct. Sure, you can mute yourself, clam up permanently, and just listen to what others have to say in hopes of gaining an

advantage. But this won't go on forever. Eventually the other side will reach the "Hello, is anyone there?" point, and will hang up if there is no response. It is socially unacceptable to "opt out" of the sole means of communicating over the channel (in this case, audio).

But contrast this with RTAV communication methods, where it is socially acceptable to "opt out" of some portion of the channel's capabilities, at least in some circumstances. We've all been on Zoom calls where some people are "camera on" and others are "camera off." These calls can go on for hours, while still allowing those who have "opted out" of showing their faces to participate. This is a technological capability (it's possible because RTAV is a richer method of communication than phone calls), but it also has a social component. We *allow* persons to hide on Zoom calls in a way that we don't for phone calls. There are complex social reasons for this which are beyond the scope of this paper, but we've all heard the justifications: "I'm not looking my best today." "It's a mess in here." "The kids are running amok." And perhaps even, "I don't know how to turn my camera on."

Now, let me be clear: I am not saying that there aren't socially-legitimate reasons to "opt out" of a communication channel's full level of synchronicity or richness. There surely are. That being said, I do contend that this is a recipe for the "camera on" folks to be disadvantaged. By allowing others to receive more information about them than they demand in return, the "camera on" participants are permitting an information asymmetry that can—intentionally or unintentionally—be used against them. Eighteen months into the "hybrid work" era, I believe that we should now be on particular guard for "feigned helplessness" excuses. Perhaps you really didn't know how to turn your camera on in March of 2020, but you surely do in September of 2021.

Some forward-thinking companies have thus realized that there is a perverse incentive associated with "mixed" meetings, and have taken steps to prevent it. For example, StackOverflow (a software company with an 80% remote workforce) has banned "mixed" meetings in which some persons are physically located together in a room, and others are remote. Their rule: "If anyone is remote, we're all remote."³³

³³ Thomas A. Limoncelli, *Five Nonobvious Remote Work Techniques*, 63 COMM'NS OF THE ASSOC. FOR COMPUTING MACHINERY 108, 108 (Nov. 2020).

I suggest that this rule should be repurposed for us lawyers and our clients thusly: *No person of a given “rank” on any “side” of a negotiation should be allowed to use a less-rich or less-synchronous communication medium than any other person of an equivalent “rank,”* at least not without a compelling explanation. Allowing a person to “drop down” and use a less rich or less synchronous form of communication than peers in the same negotiation provides that person a tactical advantage, in that they receive more information about their counterparties than they reveal about themselves.

So, what is a reasonable person to do? Given what we learned above about the positive benefits of RTAV communication methods on negotiations, “just go back to phone conference calls” doesn’t seem like the right move. But given that there are socially-acceptable reasons for some persons to “back down” the richness level of information that they transmit in some RTAV circumstances, how do we avoid being taken advantage of? What can sort the wheat from the chaff in terms of “camera off”? There is a famous study that suggests the right answer: Tit for Tat.

The “Tit for Tat” study was created by political scientist Robert Axelrod of the University of Michigan in the late 1970s. He was investigating the optimal strategy in “the prisoner’s dilemma,” where one must choose whether to maintain solidarity with—or sell out—one’s hypothetical accomplice. Axelrod invited entries into a computer tournament in which computer programs would compete to see which one had the superior outcome in the prisoner’s dilemma negotiation, repeated over and over again. The computer program that had the best track record over the course of time in a multiplayer tournament would be the winner.³⁴

The winner was a program called “Tit for Tat.” Basically, Tit for Tat does exactly what its name implies: “[It] starts with a cooperative choice, and thereafter does what the other player did on the previous move.”³⁵ So Tit for Tat always tries the “integrative” strategy first. It hopes to cooperate, and it takes a risk in being the first to offer cooperation. But once a counterparty tries to take advantage of Tit for Tat, it is done cooperating until the other side makes an offer to cooperate.³⁶

³⁴ See generally Robert Axelrod, *More Effective Choice in the Prisoner’s Dilemma*, 24 J. OF CONFLICT RES. 379 (1980).

³⁵ *Id.* at 382.

³⁶ Axelrod recognized the evolutionary-biology implications of his study, and pointed them out in his paper. Tit for Tat was the simplest, which meant it was the most likely to evolve by random mutation, and it proved to be the most successful. *Id.* at 398-401.

As Axelrod describes it, “Tit for Tat was the simplest program submitted in the first round [of the tournament], and it won the first round. It was the simplest submission in the second round, and it won the second round. Even though all the entrants to the second round knew that Tit for Tat had won the first round, no one was able to design an entry that did any better.”³⁷ Basically, Tit for Tat just had the demonstrably superior negotiating strategy.³⁸ Tit for Tat can be thought of as empirical proof that our grandmothers were right: Over the long run, all other things being equal, it just pays to be nice to others.³⁹

I submit that Tit for Tat shows us the way when it comes to dealing with potential information asymmetries in RTAV negotiations. Start by turning your camera on. See if everyone else reciprocates. If they do, great! All of the potential positive benefits of rich, real-time communication are now at hand. But if someone, anyone, fails to turn on their camera, ask why. Unless their excuse is exceedingly compelling and/or makes it impracticable for them to turn the information asymmetry to their advantage (e.g., they’re driving a car and can’t look at a screen), politely explain that you believe in “camera parity,” and have equivalent persons on your side of the negotiating table drop down to “camera off” as well. Tit for tat.

Of course, this discussion also suggests the opportunity to *exploit* camera on / off information asymmetries. It is easy to fall into the habit of just assuming that every Zoom meeting will be “mixed” in terms of cameras on or off, and that this is no big deal. It is also hard to ask counterparties why they aren’t sharing their faces.⁴⁰ Because many people will not have the stomach to engage in these uncomfortable preliminary discussions, or because they will just forget to do so, it is possible to gain an advantage for one’s client when an information asymmetry presents itself. Whether to do so involves complex questions of morality, ethics, and advocacy, and the reader will have to decide for him or herself how to approach each situation. I would submit, however, that Tit for Tat is an effective guide: “Tit for Tat foregoes

³⁷ *Id.* at 382.

³⁸ *Id.* at 382 (“[S]ome of the reasons for its success...[include] its property of never being the first to defect ('niceness') and its propensity to cooperate after the other player defected ('forgiveness' with the exception of a single punishment).”).

³⁹ *Id.* at 396 (“[N]o one was able to benefit more than they were hurt in the tournament by [their] attempt to exploit the easy-going . . . So Tit for Tat, which got along with almost everyone, won the second round of the tournament just as it had won the first round.”).

⁴⁰ Indeed, my own personal experience shows that this is even difficult when one has “hard power” over negotiation counterparties, such as one’s own employees.

the possibility of exploiting other [players]. While such exploitation is occasionally fruitful, there are serious problems in trying to turn it into an effective strategy over a wide range of environments.”⁴¹

IV. CONCLUSION

The Pandemic force-placed remote work into our lives. As social distancing increasingly fades into the distance, it is unlikely that we will see a 2019 version of “normal” return. Instead, “hybrid work” is likely here to stay. This in turn means that the world of Zoom calls and mixed meetings is also here to stay.

In this post-Pandemic world, the research suggests that we need to do two things. First, we need to match the medium to the message. The more complex and nuanced a message we need to send, the richer and more real-time the communication method required to successfully convey it. Leveraging RTAV methods for these messages is likely to improve negotiation success. A curious benefit of the Pandemic is that we have plugged a hole in our communication toolset by adopting RTAV tools into our daily lives. In this new world, it’s time for us to think about *how* we communicate as much as *what* we communicate.

This is so because these same RTAV communication methods are particularly ripe for information asymmetries, whether intentional or unintentional. We now need to be on guard for information asymmetries, and we ought not to allow ourselves to sleepwalk into disadvantages. Yes, there are socially-legitimate reasons to be “off camera.” But there is no rule that we need to blithely allow anyone to sit behind the technology equivalent of mirrored glass. Instead, we should demand “camera parity” when it comes to negotiation participants. As Tit for Tat shows, it pays to make oneself vulnerable and offer cooperation, but that must always be a two-way street.

JLE

⁴¹ Alexrod, *supra* n.34, at 402.